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No. 03–0526

Supreme Court, U.S.
FILED
NOV - 7 2003
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IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,
PETITIONER,

-vs-

WARREN WESLEY SUMMERLIN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

REPLY TO ARGUMENTS FOR DENYING THE PETITION ... 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES — PAGE

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 5
Boyd v. State, 2003 WL 22220330, at * 26
(Ala. Crim. App. filed 9/26/2003) 3
Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) 2
Case v. Nebraska, 381 U.S. 336 (1965) 1
Colwell v. Nevada, No. 02–10947 (denied 11/3/2003) 1
Head v. Hill, 2003 WL 22282293, at * 2–3 (Ga. Oct. 6, 2003) 3
Kyles v. Whitley, 498 U.S. 931 (1990) 1
Lessley v. Bruce, 2003 WL 21402580 (D. Kan. 2003) 4
Palmer v. Clarke, 2003 WL 22327180, at * 33–37
(D. Neb. filed 10/9/2003) 3, 4
Ring v. Arizona, 536 U.S. 584 (2002) 1-4
Ryan v. Clarke, 2003 WL 22423159, at * 4–5 n.5
(D. Neb. filed 10/24/2003). 4
Sibley v. Culliver, 243 F.Supp. 2d 1278 (M.D. Ala. 2003) 4
State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996) 5
State v. Lee, 185 Ariz. 549, 917 P.2d 692 (1996) 5
State v. Montaño, 2003 WL 22389442 (Ariz. Oct. 21, 2003) 3
State v. Nordstrom, 77 P.2d 40 (Ariz. 2003 3
State v. Ring, 204 Ariz. 534, 65 P.3d 915 (2003) 4, 5
State v. Sansing, 77 P.3d 30 (Ariz. 2003) 3
State v. Towery et. al, 204 Ariz. 386, 64 P.2d 828 (2003) 1
State v. Walden, 183 Ariz. 595, 905 P.2d 974 (1995) 5
Summerlin v. Stewart, 312 F.3d 1157 (9th Cir. 2003) 1, 2, 3, 4
Teague v. Lane, 489 U.S. 288 (1989) 2, 3, 4
Towery et. al v. Arizona, No. 03-5983 (dismissed 9/18/2003). 1
Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) 2, 3
United States v. Battle, 264 F.Supp. 2d 1088 (N.D. Ga. 2003) 4
Whitfield v. Bowersox, 343 F.3d 950 (8th Cir. 2003) 3
Yates v. Aiken, 484 U.S. 211 (1988) 1

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VI 4, 5

STATUTES

28 U.S.C. § 2244(b)(2)(A) 2
28 U.S.C. § 2244(b)(3)(A) 2
A.R.S. § 13–703(F)(2) 4

REPLY TO ARGUMENTS FOR DENYING THE PETITION

• Summerlin contends that the Ninth Circuit and the Arizona Supreme Court reached opposite results on whether the holding of *Ring v. Arizona*, 536 U.S. 584 (2002), should be applied retroactively to cases on collateral review was "neither surprising nor particularly significant." (Brief in Op. at 5; *compare Summerlin v. Stewart*, 312 F.3d 1157 (9th Cir. 2003), with *State v. Towery*, 204 Ariz. 386, 64 P.2d 828 (2003).) Summerlin reasons that, because the conflict "does not concern a substantive constitutional issue. . . . the legal principles governing this question are, quite permissibly, different under state and federal law." (*Id.*; footnote omitted.) This contention fails to recognize that the high courts of Arizona, Nevada and Nebraska are *not* free to adopt a retroactivity rule *less* favorable to a defendant than what the United States Constitution requires. *See Yates v. Aiken*, 484 U.S. 211 (1988) (a state court cannot refuse to apply a rule of federal constitutional law retroactively based on its interpretation limiting the scope of its post-conviction collateral proceedings). Thus, if the Ninth Circuit correctly concluded that the rule announced in *Ring* applies retroactively, the Arizona, Nevada, and Nebraska rulings to the contrary cannot stand.[1]

Neither of the two cases cited by Summerlin in support of this contention, *Case v. Nebraska*, 381 U.S. 336 (1965) and *Kyles v. Whitley*, 498 U.S. 931 (1990) (Stevens, J., concurring in denial of application for stay of execution), suggest that a state court can refuse to apply a new rule of constitutional procedure to cases that are final, if this Court has held the rule to be retroactive. Thus, Arizona's decision in *Towery*, as well as the decisions by the Supreme Courts of Nevada and Nebraska, are significant.

1. This Court recently denied certiorari in a case where the Nevada Supreme Court held that *Ring* does not apply retroactively. *Colwell v. Nevada*, No. 02–10947 (denied 11/3/2003). The defendants in the Arizona case which held that *Ring* does not apply to cases on collateral review have withdrawn their petition for certorari. *Towery et. al v. Arizona*, No. 03-5983 (dismissed 9/18/2003).

• Despite the clear conflict between the Ninth Circuit and the Arizona Supreme Court, Summerlin suggests that review by this Court is not necessary because "critical factual and procedural distinctions exist" between Summerlin's case and other decisions in federal circuit courts and state courts of last resort that have declined to apply *Ring* retroactively. (Brief in Op., at 6) To the extent these distinctions exist at all, they do not justify the divergent results reached by those courts—rather, they highlight the need for this Court's intervention.

Summerlin correctly notes that the Tenth Circuit refused to apply *Ring* retroactively in *Cannon v. Mullin* because Cannon failed to make a *prima facie* showing that his successive habeas petition satisfied the requirements of 28 U.S.C. § 2244(b)(3)(A). 297 F.3d 989, 990–91 (10th Cir. 2002). This is not, however, a basis for distinguishing the Tenth Circuit's ruling. Cannon argued that the requirement of 28 U.S.C. § 2244(b)(2)(A) (prohibiting application of a new constitutional rule in a successive habeas petition unless and until this Court deems the rule retroactive) did not apply because *Ring* was a new rule of *substantive* criminal law and therefore outside the limitations of *Teague v. Lane*, 489 U.S. 288 (1989). *Cannon*, 297 F.2d at 992, 994. In rejecting this argument, the Tenth Circuit specifically decided the first question raised here: whether *Ring* announced a new rule of substantive criminal law. The Tenth Circuit's holding cannot be squared with or distinguished from the Ninth Circuit's holding on that question.

Moreover, *Cannon* highlights the potential of a district court ordering a capital defendant resentenced after concluding that *Ring* should apply retroactively, but refusing to stay the execution of another prisoner because he raised a *Ring* claim in a successive habeas petition. Given the additional limitations on review under 28 U.S.C. § 2244(b)(2)(A), it is essential for this Court to resolve questions of retroactivity, particularly in capital cases, expeditiously.

Summerlin also argues that the Eleventh Circuit's decision in *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), does not conflict with the Ninth Circuit's express ruling in *Summerlin*. Summerlin mistakenly characterizes the Eleventh Circuit discussion of *Ring*'s retroactivity

under *Teague* as "dictum." (Brief in Op., at 7.) Turner had argued that *Ring* and Florida's capital sentencing procedure were "irreconcilable." *Turner*, 339 F.3d at 1280. The Eleventh Circuit did not reach the merits of that claim because it held both that (1) the claim was procedurally barred, "and, alternatively, (2) *Ring* does not apply retroactively to Turner." *Id.*

Summerlin also asserts that "[o]ther cases cited by Petitioner as 'conflicts'" have been vacated, have held that *Ring* does not apply to the state statutes or do not involve the *Ring* issue. (Brief in Op., at 7.) Petitioner did not offer these cases to establish a conflict, but rather as other examples where state and federal courts have declined to apply *Ring*. (Pet. at 12.) Summerlin does not dispute that the courts did not apply *Ring* in those cases. Moreover, although the defendant in *Whitfield v. Bowersox* was resentenced to life, thus effectively mooting any *Ring* issue in his case, the Eighth Circuit did not expressly vacate the portion of the opinion cited in the instant petition, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003). After the Missouri Supreme Court recalled its mandate, the Eighth Circuit vacated as moot different portions of the opinion. *Whitfield v. Bowersox*, 343 F.3d 950 (8th Cir. 2003).

Moreover, the Arizona Supreme Court has expressly declined to follow *Summerlin*, and other state courts have similarly concluded that this Court's holding in *Ring* should not apply retroactively. *State v. Montaño*, 2003 WL 22389442 (Ariz. Oct. 21, 2003); *State v. Sansing*, 77 P.3d 30, at ¶ 5 n.2 (Ariz. 2003); *State v. Nordstrom*, 77 P.2d 40, at ¶ 4 n.2 (Ariz. 2003); *Boyd v. State*, 2003 WL 22220330, at * 26 (Ala. Crim. App. filed 9/26/2003) (not yet released for publication); *Head v. Hill*, 2003 WL 22282293, at * 2–3 (Ga. Oct. 6, 2003).

Summerlin has identified one federal trial court holding that "the *Ring* decision announce[d] a substantive rule of criminal law and must be accorded retroactive effect." *Palmer v. Clarke*, 2003 WL 22327180, at * 33–37 (D. Neb. filed 10/9/2003). (Brief in Op. at 7.) But another federal trial court in the same district refused to grant a certificate of appealability on a *Ring* retroactivity claim because it was a successive petition, while noting a "strong inclination to respectfully disagree"

with the result in *Palmer*. *Ryan v. Clarke*, 2003 WL 22423159, at * 4–5 n.5 (D. Neb. filed 10/24/2003). If anything, these cases demonstrate the need for this Court to grant the petition. *See also United States v. Battle*, 264 F.Supp. 2d 1088, 1099–03 (N.D. Ga. 2003) (finding *Ring* to be non-retroactive, and granting *COA on Ring issue*, 2003 WL 22327183) (filed 9/22/2003); *Sibley v. Culliver*, 243 F.Supp. 2d 1278, 1288–90 (M.D. Ala. 2003) (holding *Ring* was barred by *Teague v. Lane*, 489 U.S. 288 (1989) and not substantive change); *Lessley v. Bruce*, 2003 WL 21402580 (D. Kan. 2003) (finding *Ring* non-retroactive).

- Summerlin argues that the holding in *Summerlin* only applies retroactively to Arizona death row prisoners. (Brief in Op., at 8.) But the *Palmer v. Clarke* case he cites belies his argument. There, the federal district court held that *Ring* announced a substantive rule of criminal law applicable to Nebraska death row inmates. *Id.* at * 37.

- At Summerlin's July 1982 sentencing proceeding, the trial court found as one of the aggravating circumstances that Summerlin had previously been convicted of a felony "involving the threat or use of violence on another person." *See* A.R.S. § 13–703(F)(2) (1981) (amended 1993). Summerlin correctly notes that the Arizona Supreme Court recently stated in discussing the pre-1993 version of (F)(2) that "when an additional finding must be made beyond the bare fact that a prior conviction exists, the Sixth Amendment demands that a jury perform the task." *State v. Ring*, 204 Ariz. 534, 65 P.3d 915, 939 ¶ 68 (2003). "That situation can arise for defendants whose F.2 factor depended upon a finding that a prior conviction reflected a crime involving the use or threat of violence." *Id.* That discussion, however, was *dicta* because none of the consolidated cases involved a defendant sentenced under such a circumstance. *Id.*

In deciding whether the prior felony conviction involved a threat or use of violence on another person, the trial court in Summerlin's case did not make a *factual* finding. Rather, under Arizona law, the court made a *legal* determination, whether under the statutory definition of the prior crime or the jury instructions, the *only* way that the defendant

could have committed the crime would have been by the use of violence. *E.g.*, *State v. Lee*, 185 Ariz. 549, 557, 917 P.2d 692, 700 (1996); *State v. Kemp*, 185 Ariz. 52, 63–64, 912 P.2d 1281, 1292 (1996); *State v. Walden*, 183 Ariz. 595, 617, 905 P.2d 974, 986 (1995).

Furthermore, these types of legal determinations are exempt from the Sixth Amendment jury requirement under *Ring* and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Therefore, the Ninth Circuit should have considered Arizona's argument that, because the trial court found one aggravating circumstance that fell outside the scope of *Ring*, Summerlin's case fell outside the holding of *Ring*.

- Summerlin contends that *Almendarez-Torres* is no longer good law because five Justices are on record disproving its holding. (Brief in Op., at 9 n.3.) Such an argument offers additional support for the Arizona's position that certiorari is warranted in this case.

CONCLUSION

Based on the foregoing authorities and arguments, this Court should grant the petition for writ of certiorari to either summarily reverse the decision of the Ninth Circuit, or to accept this case for full briefing and consideration upon the merits.

Respectfully submitted,

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